Supreme Court, U.S.
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No. 94-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD R. MELLO and
BARBARA J. MELLO,
Petitioners,

v.

JOYCE L. WOODHOUSE, et al.,
Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court should decline discretionary review of this matter because the Nevada Supreme Court based its decision on independent and adequate state grounds under the Nevada Constitution.

II. Whether the Court should decline discretionary review based upon federal question jurisdiction because the provisions of the Employment Retirement Income Security Act of 1974 (ERISA) relating to individual pension benefits for members of a pension plan do not apply to the Public Employees Retirement System of Nevada (PERSN) or the Legislative Retirement System (LRS) by virtue of the exemption to ERISA for public pensions systems found at 29 U.S.C. 1003(b)(3)(1985).

III. Whether the Court should decline review for procedural due process violations on the basis that Petitioners are due only

the actual legislative process as procedural due process prior to the enactment of legislation.

LIST OF PARTIES

Petitioners in this matter were the Appellants in the Nevada Supreme Court. They are Donald R. Mello and Barbara J. Mello.

Respondents in this matter were respondents in the Nevada Supreme Court. They are: Joyce L. Woodhouse, Steve Cozine, John A. Caserta, Julius Conigliaro, and O.C. Lee as members of the Public Employees Retirement Board of the State of Nevada; Will Keating, as Executive Officer of the Public Employees Retirement System of the State of Nevada, and the Legislators' Retirement System.

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OPINIONS AND JUDGMENTS BELOW

The Petitioners, Donald and Barbara Mello purport to raise five (5) issues to this Court for review. See Mello, et ux. v. Woodhouse, et al., Case No. 94-573, Petition for Writ of Certiorari. (Petition). Review is sought of the published opinion of the Nevada Supreme Court filed April 6, 1994. (Petitioner's Appendix, A-1). The state district court's unpublished decision which preceded the appeal to the Nevada Supreme Court was filed on August 8, 1992. Appendix B to Petition. The state district court, subsequent to the rendering of its decision rendered findings of fact and conclusions of law and judgment filed on October 22, 1992. Appendices C, D and E.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked by the subject certiorari petition pursuant to 28 U.S.C.A. § 1257 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const. art. I, § 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in the Payment of Debts; pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without Consent of the Congress, lay any Impost or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep troops, or Ships of War in time of Peace, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

B. Nev. Const. art. 4, § 33.

The members of the Legislature shall receive for their services, a compensation to be fixed by law and paid out of the public treasury, for not to exceed 60 days during any regular session of the legislature and not to exceed 20 days during any special session convened by the governor; but no increase of such compensation shall take effect during the term for which the members of either house shall have been elected Provided, that an appropriation may be made for the payment of such actual expenses as members of the Legislature may incur for postage, express charges, newspapers and stationery not

exceeding the sum of Sixty dollars for any general or special session to each member; and Furthermore Provided, that the Speaker of the Assembly, and Lieutenant Governor, as President of the Senate, shall each, during the time of their actual attendance as such presiding officers receive and additional allowance of two dollars per diem.

C. 29 U.S.C. § 1003 (1985).

Sec. 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained--

(1) by any employer engaged in commerce or any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if--

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

D. Sup. Ct. R. 17.

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeal has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in

conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court.

STATEMENT OF THE CASE

Former State Senator Donald Mello and his wife Barbara Mello filed this matter in Nevada district court in January 1991. The case came to trial on June 15, 1992, and concluded on June 22, 1992. The matter was

heard by the district court without jury. The decision by the district court was premised upon the Nevada Constitution. The Honorable Judge William Forman determined that a pension is a part of compensation for a legislator and as such subject to the state constitutional limitation on the taking of increases in compensation passed during a legislator's natural term of office. In essence, a pension contract purporting to increase legislative compensation could not be created until the sitting legislator's natural term expired. The court delayed vesting in an increased legislative retirement until after that date. This delay in vesting gave effect to the proscription in the Nevada Constitution against the taking of increased pensions as part of compensation to the legislator passed while the legislator was fulfilling his term of office.

The case was appealed to the Nevada Supreme Court. In the April 6, 1994, opinion the court determined that the pension benefit given Senator Mello was given in contravention of the Nevada Constitution and therefore was not subject to vesting at the time received (illegal contract). Vesting would have occurred after the natural expiration of the Senator's term, and by then the repeal of the higher pension benefit was complete.

STATEMENT OF THE FACTS

This matter arises due to the passage of Assembly Bill 820 of the 1989 session of the Nevada Legislature. See Petitioner's Petition, 3--8. This bill was a comprehensive pension act providing amendments to both the regular Public Employees Retirement Fund (NRS 286.010 et seq.) and the Legislators Retirement Fund (NRS 218.2371 et seq.). Sections 11 through 15 of the bill addressed changes in the

Legislators' Retirement System, including an approximately 300 percent increase in the benefits to legislators. AB 820 passed out of the Legislature and to the Governor who vetoed the bill. The bill was returned to the Legislature and both houses voted to override the veto the same day. On June 23, 1989, AB 820 became law in Nevada. Senator Mello took advantage of the provisions affecting the Legislators' Retirement System and retired at midnight on September 30, 1989. His natural term of office would not expire until almost eighteen (18) months later.

On November 21, 1989, the Legislature convened in Special Session at the call of the Governor for the sole purpose of repealing sections 11 through 15 of AB 820, the legislative pension provisions of the bill. Chapter 1 Special Session 1989 repealed the enhanced pension benefits and returned the benefit level to the level

prior to the 1989 regular legislative session. The bill also required the Public Employees Retirement System, as administrators of the Legislators' Retirement System, to cancel any and all purchase of service credit agreements and to return any funds received for the purchase of service. On November 22, 1989, the Executive Officer of the Public Employees Retirement System sent a certified letter to former Senator Mello addressing the mandates of the Special Session and returning to him the amount tendered to the Retirement System for the purchase of service credit plus interest. This lawsuit ensued.

SUMMARY OF THE ARGUMENT

There are several reasons why this Court should decline review of this matter given the discretionary nature of the review in certiorari. First, this case was decided by the Nevada Supreme Court upon independent

and adequate state grounds. The overriding determination of the Nevada Supreme Court rested upon the interpretation of a provision of the state constitution governing when and how much compensation a legislator in Nevada should receive. Nev. Const. art. 4, § 33.

Second, former Senator Mello and his wife apparently assign factual and legal error to the Nevada Supreme Court in upholding the state district court decision in this matter. The errors assigned focus primarily upon the Nevada Supreme Court's interpretation of Nevada Constitutional law and the law of equity as applied by the Nevada courts. Such interpretations are not reviewable by this Court unless in conflict with the Federal Constitution or preempted by federal statute. Neither of these types of errors are present in this case.

Third, Petitioners allege violations of the Employment Retirement Income Security

Act of 1974 (ERISA) as a question of federal law, allegedly interpreted incorrectly by the Nevada Supreme Court. The provisions governing benefits to individuals under the Legislators' Retirement System are not governed by ERISA. 29 U.S.C. 1003(b)(1)(1985). The provisions of ERISA applicable to the Legislative Retirement System relate only to plan qualification, and the record in this matter does not address the issue of plan qualification. See generally, 26 U.S.C. § 401 (1986), et seq. and 26 U.S.C. § 415 (1986), et seq. This matter rests solely on the entitlement or lack of entitlement to modified pension benefits by an individual in a public pension plan. Plan status as qualified or not does not affect the rights of the individual members of the public pension plan. The remedy when a public pension plan is disqualified under ERISA is for the plan to lose its tax exempt status with the Internal Revenue Service.

The remedy sought by the Petitioners in this matter cannot be achieved through an invocation of the plan qualification provisions of ERISA. This argument is without foundation or merit and rests upon false assumptions concerning the applicability of federal law.

Fourth, Petitioners allege a violation of their due process rights committed by the Nevada Legislature when the legislature refused to allow testimony at the Special Session of 1989. Such acts cannot be attributed to the Public Employees Retirement System or to the Legislators' Retirement System. The Legislature of the State of Nevada is not a party to this suit, nor has it ever been a defendant in this matter. Additionally, the only process due the Petitioners in the passage of legislation is what the legislature gives.

Finally, Petitioners seek to increase the record in this matter by setting forth facts

in their petition which are not a part of the record below. This court reviews questions of law and should not be called upon to review newly alleged evidence.

ARGUMENT

A. IT IS WELL ACCEPTED THAT THIS COURT WILL NOT REVIEW A DECISION OF A STATE COURT RESTING UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

The Nevada Supreme Court, in making its determination in this matter, concluded that Senator Mello's alleged contract for pension benefits was specifically limited by Nevada law. Article 4 section 33 of the Nevada Constitution prevents a legislator from taking an increase in compensation passed during his term of office, therefor any contract purporting to increase those benefits in violation of the Nevada State Constitution is void as against state law and should not be given protection of the United States Constitution under Article I section 10 (contracts clause).

Pensions are a part of compensation under Nevada law. City of Las Vegas v. Ackerman, 85 Nev. 493, 457 P.2d 525 (1969). The Nevada Supreme Court determined in this matter that the constitutional prohibition only may be given meaning in the pension context if the prohibition remained in effect even when a legislator's term is cut short by resignation and/or retirement. The prohibition acts as a delay to vesting until the end of the legislators' natural term of office. Based upon this state constitutional prohibition, the Nevada Supreme Court determined that Senator Mello's pension contract was not and could not be impaired because it could not be created until his natural term of office expired. By the time his natural term of office expired (January 1991), the Nevada Legislature repealed the increased pension for legislators. That which is not an enforceable contract right is not an

obligation which can be impaired with in the meaning of the Contracts Clause. Morton v. Dardanelle Special School District, 121 F.2d 423 (8th Cir. 1941), cert. denied, 314 U.S. 655, reh'g denied, 314 U.S. 713 (1941).

No enforceable contract with Senator Mello existed at the time of the repeal of the provisions of AB 820 affecting legislators' pensions.

B. THE SUPREME COURT IS NOT A COURT OF GENERAL JURISDICTION WHICH CAN CORRECT ALLEGED ERRORS IN STATE COURT PROCEEDINGS.

The Petitioners assign many errors to the Nevada Supreme Court's decision in this matter, several of which are factual in nature or are matters of interpretation of state law. Error is assigned to the reliance by the Supreme Court on the facts surrounding the Common Cause Petition drive because Petitioners believe the referendum was illegal. Whether the petition was meritorious or not has no effect on the

present case. This Court does not review, but accepts as conclusive the findings of facts made by the state court. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 97 (1909).

Additionally, Petitioners give great weight to the California case of Legislature of the State of California v. Eu, 286 Cal. Rptr. 283 (Cal. 1991). This case is a state court case involving principles of state law and California constitutional law. As such this court may not sit in review of a Nevada Supreme Court case on the basis of what was done in a neighboring state with respect to that state's laws. This is precisely what Petitioners would have this Court do.

Additionally, Petitioners assign error to the Nevada Supreme Court's decision on the basis that "The claim that Mello cannot receive his benefits because of article 4 section 33 of the Nevada Constitution has arisen this one time only because of

politics, and for no other reason." Petition at page 45. Nothing in the record below supports any political motivations of the Nevada Supreme Court or the district court in determining this benefit was not an enforceable contract. In fact, Petitioners' argument based upon alleged facts surrounding judicial retirement is not properly before this court, because those arguments and facts were excluded by protective order of the district court during trial.

Rather, the issue of interpretation of article 4 section 33 has never come to the courts of Nevada in any prior action. The Nevada court is consistent in its enforcement of limitations on the taking of increases in compensation passed during a term of office of a sitting public official. To allow a public official to set his own compensation is to give him an extraordinary

power. Cannon v. Taylor, 87 Nev. 285, 486 P.2d 493 (1972).

C. PETITIONERS' RELIANCE ON THE PROVISIONS OF ERISA IS ERRONEOUS.

Petitioners charge that the repeal of the Legislators' provisions of AB 820 violates ERISA for several reasons including technical compliance with provisions of the federal act governing private pension plans (See Petition at 16-23 and 29-31 for reference to various provisions of ERISA including retroactive amendment, hours of service, notice to and approval by the Secretary of Labor for plan changes, vesting, funding, minimum participation standards, forfeiture, etc.). The Legislators' Retirement System of the State of Nevada is expressly exempt from the benefit provisions of ERISA by virtue of 29 U.S.C 1003(b)(3)(1985).

D. THE LEGISLATIVE PROCESS ITSELF IS ALL THAT IS DUE INDIVIDUALS IN THE

PASSAGE OF LAWS BY A STATE LEGISLATURE.

The Petitioners in this matter assign error to the Nevada Supreme Court due to that court's failure to address the federal procedural due process violations alleged. Petitioners allege a violation of the 14th Amendment to the United States Constitution because they were not permitted to address the Legislature at the 1989 Special Session in 1989 when sections 11 through 15 of AB 820 were repealed. A federal question is not substantial if it is plainly without foundation or merit. Ennis Waterworks v. Ennis, 233 U.S. 652, 656 (1914). Neither is a federal question substantial when it rests upon false assumptions. Parker v McLain, 237 U.S. 469 (1915). When government, through the legislature, passes legislation which affects a general class of persons, those persons have all received procedural due process --- the legislative process. The laws themselves must then be

challenged upon their validity under the Constitution. In this case, Petitioners have attacked the validity of the repeal on substantive constitutional grounds: the Contracts Clause. Such substantive attack on the repeal of AB 820 must fail because, as previously discussed, no protectable contract interest existed in the Mellos' at the time of the repeal due to the limitation on compensation found in the Nevada Constitution.

CONCLUSION

Respondents respectfully request that this Honorable Court deny the certiorari petition of Donald R. and Barbara J. Mello.

DATED: October 21, 1994.

Respectfully submitted.

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